MEMORANDUM OF LAW

DATE: July 16, 1992

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Applicability of Americans with Disabilities Act ("ADA") to City Employees' Retirement System ("CERS")

You have requested a legal opinion concerning the impact of Title I of the ADA on CERS. In support of this request, you have submitted nine questions. Our analysis of Title I of the ADA and the responses to your specific questions follow.

BACKGROUND

On January 26, 1992, the ADA was signed into law. By all accounts, the ADA is the most sweeping antidiscrimination measure passed by Congress and signed into law since the Civil Rights Act of 1964. Generally, it provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, access to state and local governmental services, public accommodations, transportation, and telecommunications.

Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit. Significantly, the ADA does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities. Instead, when an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.

> The ADA thus establishes a process in which the employer must assess a disabled individual's ability to perform the essential functions of the specific job held or desired. While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or

> applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.

Equal Employment Opportunity Commission ("EEOC"), 56 Fed. Reg. 35739 (1991) (to be codified at 29 C.F.R. Part l630).

The stated purposes of the ADA are:

1. To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

2. To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

3. To ensure that the Federal Government plays a central role in enforcing the standards established by the ADA on behalf of individuals with disabilities; and

4. To invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

The scope of the ADA is very broad. Its overall goal is to provide for full integration of disabled persons in society and to eliminate segregated accommodations and services to the greatest possible extent. There are five titles to the ADA: Title I - Employment; Title II - Public Services; Title III - Public Accommodations and Services Operated by Private Entities; Title IV - Telecommunications; and Title V - Miscellaneous Provisions.

The EEOC is the primary federal agency for regulation and enforcement of ADA Title I provisions. Final Regulations were issued on July 26, 1991, at 29 C.F.R. Part 1630. The format of the EEOC Final Regulations reflect congressional intent, as expressed in the legislative history, that any regulations implementing the employment provisions of the ADA be modeled on the regulations implementing section 504 of the Rehabilitation Act of 1973, as amended, 34 C.F.R. Part 104.

Recognizing further the congressional intent that any regulations implementing the ADA be comprehensive and easily understood, the EEOC Final Regulations, define terms not previously defined in the regulations implementing Section 504 of the Rehabilitation Act. Where possible, the EEOC Final

Regulations establish parameters to serve as guidelines for inquiries into the meaning and coverage of the ADA. In addition to issuing Final Regulations, the EEOC also issued an Interpretive Guidance as an appendix to the Regulations. This Interpretive Guidance represents the EEOC's interpretation of how its regulations should be enforced. According to the EEOC, the Interpretive Guidance will be its guide in resolving charges of employment discrimination.

With respect to the relationship between the Rehabilitation Act and the ADA, Section 501 of the ADA specifically provides that both the ADA and the Rehabilitation Act are to be considered in tandem. The ADA also requires enforcement agencies to promulgate procedures to ensure that complaints filed under both the ADA and the Rehabilitation Act are handled so as to avoid duplication of effort and the application of conflicting standards. 42 U.S.C. Section 12117(b) (Supp. 1992). In essence, the ADA is meant to be an expansion of the protections afforded under the Rehabilitation Act. The law under the ADA is not to diverge from the law that has been developed under the Rehabilitation Act's provisions. The ADA must also be harmonized with Title VII of the Civil Rights Act. 42 U.S.C. Section 2000e(b) (1989). Case law enforcement and procedures under these Acts are to be applied to the enforcement and interpretation of the ADA.

Significantly, the ADA is not an affirmative action statute. It is instead a "complaint driven" statute where an aggrieved individual files a grievance with the EEOC. Upon the filing of a grievance, the EEOC will serve a notice of the charge on the covered entity and conduct an investigation. If the EEOC determines that there is no reasonable cause to believe the charge is true, the EEOC will dismiss the charge and so notify the claimant and the covered entity. If the EEOC determines there is reasonable cause to believe the charge is true, the EEOC will first attempt to eliminate the discriminatory practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. Section 2000e-5 (1989).

In the case of a governmental employer, if the EEOC is unable to resolve the matter informally, the EEOC will refer the case to the Attorney General who may then bring a civil action against the employer in the United States District Court. If the charge was dismissed by the EEOC or the Attorney General does not file a civil action, the person who filed the charge may file a civil action against the employer.

If the District Court finds that the employer intentionally engaged in the alleged discrimination, the Court may enjoin the

employer from engaging in the unlawful employment practice and may order such affirmative action as the Court deems appropriate. This may include reinstatement or hiring of employees (with or without back pay.)

The remainder of this Memorandum of Law addresses Title I directly. The responses to your questions follow the Title I summary.

TITLE I - EMPLOYMENT

Title I of the ADA provides generally that no employer or other entity governed by the Act's terms may discriminate against a qualified individual with a disability in the terms and conditions of employment. Specifically, the ADA provides that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. Section 12112 (Supp. 1992).

A. What Constitutes Employment Discrimination

Prohibited discrimination includes not only the traditionally concerned forms of adverse action against persons with disabilities, such as failing to hire disabled job applicants or relegating employees with disabilities to low level jobs. Discrimination under the Act also encompasses an employer's failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee or applicant with a disability, absent a showing that the accommodation would impose an undue hardship on the operation of the business.

Other practices constituting employment discrimination include segregating or classifying a job applicant or employee in a way that adversely affects his or her opportunities or status because of the disability; utilizing standards or methods of administration that have the effect of discrimination or that perpetuate the discrimination; excluding or otherwise denying equal jobs or benefits to a qualified individual because of the disability of a person with whom the qualified individual has a relationship or association; and using qualification standards, employment tests or other selection criteria that screen out or tend to screen out individuals with disabilities. 42 U.S.C. Section 12112(b) (Supp. 1992).

In addition, the prohibition extends to medical examinations and inquiries. For example, the covered entity may not conduct a pre-employment medical examination or make preemployment inquiries as to whether the applicant has a

disability or as to the nature of the disability. The employer may, however, inquire into the ability of the applicant to perform job-related functions. The covered entity may also require a medical examination after an offer of employment has been made and may condition an offer of employment on the results of the examination where (1) all entering employees are subjected to the examination regardless of disability, and (2) the results are kept as a confidential medical record. The covered entity must be able to show that the medical examination is job related and consistent with business necessity. 42 U.S.C. Section 12112(c) (Supp. 1992).

B. Who is an "Employer" Under the ADA

The ADA defines "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year . . . ." 42 U.S.C. Section 12111(5)(A) (Supp. 1992). For the first two years following the effective date of the statute, i.e., until July 26, 1994, the term "employer" is limited to persons who have 25 or more employees. After that date, the above-referenced definition is applicable.

Significantly, the definition of employer also includes an "agent" of any such person. 42 U.S.C. Section 12111(5)(A) (Supp. 1992). This definition mirrors that of Title VII of the Civil Rights Act of 1964, so that any precedent under Title VII should be relevant in the context of the ADA.

C. What is a Disability Under the ADA

For Title I of the ADA, " ┌tσhe term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. Section 12102(2) (Supp. 1992). To aide in the understanding of what constitutes a disability under the ADA, the terms "physical or mental impairment," "substantially limits," "major life activities," and other phrases in this comprehensive definition of disability have been expanded upon.

1. Physical Or Mental Impairment

A physical impairment is " ┌aσny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." A mental impairment is " ┌aσny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental

illness, and specific learning disabilities." EEOC, 56 Fed. Reg. 35735 (1991).

Under the Interpretive Guidance, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." EEOC, 56 Fed. Reg. 35740 (1991). Thus, a person with epilepsy is considered as having an impairment even if the symptoms are controlled by medication and a person with a hearing loss is considered as having an impairment even if the condition is correctable with a hearing aid.

The Interpretive Guidance distinguishes between impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. For example, "impairment" does not include eye color, left handedness, or height, weight, or muscle tone that is within normal range and is not caused by a physiological disorder. "Impairment" also does not include pregnancy or predisposition to illness or disease. In addition, it does not include common personality traits, such as poor judgment, unless they are symptoms of a disorder. Finally, economic or environmental disadvantages such as poverty, lack of education or a prison record are also not impairments.

2. Substantially Limits

"Substantially limits" means unable to perform a major life activity that the average person in the general population can perform or being significantly restricted as to the condition, manner or duration under which the activity can be performed. EEOC, 56 Fed. Reg. 35741 (1991). Factors which should be considered are:

(1) the nature and severity of the impairment;

(2) the duration or expected duration of the impairment; and

(3) the permanent or long term impact, ...

The Interpretive Guidance notes that the determination of whether an individual has a disability is based on the effect of the impairment on the life of the individual. An impairment may be disabling for one person but not for another depending on the stage of the disease, the presence of other impairments that combine to make the impairment disabling, or any number of other factors. The Guidance provides some examples:

> A broken leg ordinarily is not substantially limiting because it takes about eight weeks to heal. But if the leg heals improperly and permanent impairment results, the person could be disabled because of the long term impact.
>
> A head injury could heal in a short time but if

there were permanent cognitive effects (e.g., loss of short term memory functions), the person could be considered disabled.

A person who once had been able to walk at an extraordinary speed would not be substantially limited in walking if, as a result of a physical impairment, he or she were only able to walk at an average speed. But if a person uses artificial legs, the person would be substantially limited because the person is unable to walk without the prosthetic devices.

The Interpretive Guidance emphasizes that the restrictions on performance of a major life activity must be the result of a condition that is an impairment. An individual who can not read because he or she was never taught to read is to an individual with a disability because lack of education is not an impairment. If the inability to read is because of dyslexia, the person would have a disability because a learning disability, such as dyslexia, is an impairment. EEOC, 56 Fed. Reg. 35727 (1991).

3. Major Life Activity

A major life activity is a function "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." EEOC, 56 Fed. Reg. 35735 (1991). The list is not exhaustive; other activities such as sitting, standing, lifting and reaching may also be included.

The standard is that it is a basic activity that the average person in the general population can perform with little or no difficulty. Thus, the ability to lift a five-pound object would probably be considered a major life activity, but the ability to bench press three hundred pounds would not.

The concept of "working" as a major life activity is analyzed a bit differently. If a person is substantially limited in another major life activity (e.g., the person is blind), it is not necessary to determine whether the person is substantially limited from working. But if the other major life activities are not substantially limited, the determination of whether the person is substantially limited from working must be made on a case-by-case basis. A person is not substantially limited from working simply because he or she is unable to perform a particular job for one employer or because he or she is unable to perform specialized job requiring extraordinary skill or powers.

For example, a professional baseball pitcher who develops a bad elbow and can no longer throw a ball is not substantially limited in working. In contrast, consider an individual with an allergy to a substance that is found in most high rise office

buildings and makes breathing extremely difficult. Under the Interpretive Guidance, that person would be substantially limited from working because the person would be unable to perform a broad range of jobs that are conducted in high rise office buildings. EEOC, 56 Fed. Reg. 35735 (1991).

4. Having A Record of and Being Regarded as Having ┌an Impairmentσ

Disability not only means actually having an impairment which substantially limits a major life activity. It also includes "having a record of" or "being regarded as having" such an impairment.

"Having a record of" means actually having had an impairment even where the condition no longer exists, or having been misdiagnosed as having a covered condition. EEOC, 56 Fed. Reg. 35735 (1991). The intent of this provision is to ensure that people are not discriminated against because of a history of disability. For example, this protects former cancer patients from discrimination based on their prior medical history. In addition, the provision protects from discrimination persons who were misclassified as having learning disabilities.

"Regarded as having such an impairment" means:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

EEOC, 56 Fed. Reg. 35735 (1991).

As an example, consider the situation where an employee has controlled high blood pressure that is not substantially limiting. If the employer reassigns the employee to less strenuous work because of unsubstantiated fear the person would suffer a heart attack, the employee is being treated as disabled. An example under the second part of the definition is an employee who is discriminated against because of a prominent facial

disfigurement which causes negative reactions from customers.

5. Excluded Conditions

Certain conditions are specifically not considered "disabilities," and the ADA does not prohibit employment discrimination based on these conditions. Included in these exceptions are psychoactive substance use disorders resulting from current illegal use of drugs; compulsive gambling, kleptomania, or pyromania; and certain sexual behavior disorders such as transvestism, pedophilia, exhibitionism, and voyeurism.

D. Who is a Qualified Individual With a Disability

A qualified individual with a disability is defined at Section 1630.2(m) of the EEOC, 56 Fed. Reg. 35735 (1991), as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."

The Interpretive Guidance lists two steps in the determination of whether an individual with a disability is "qualified." The first step is to determine if the individual satisfies the prerequisites for the position such as possessing the appropriate educational background, employment experience, skills and licenses. For example, the first step in determining whether a paraplegic applying for a position as an attorney was a qualified individual with a disability would include an examination into the applicant's credentials to determine whether he or she has been admitted to the State Bar.

The second step would be a determination as to whether the individual can perform the essential functions of the job, with or without reasonable accommodation. This step requires an analysis of both "essential functions" and "reasonable accommodation."

1. Essential Function

Section 1630.2(n) of the EEOC, 56 Fed. Reg. 35735 (1991), describes "essential functions" as "the fundamental job duties of the employment position . . . ." The distinction is made between "essential" and "marginal" functions. Factors to be considered in determining whether a job function is essential may include the following:

a. The reason the position exists is to perform that function. (Example: An individual may be hired to type reports. The ability to type is an essential function because this is the only reason the position exists.)

b. There is a limited number of exemployees available to perform the job function. (Example: If a shopkeeper has a small number of employees available for the volume of work, it may be necessary that each employee be able to perform the functions of stocking shelves and operating the cash register.

c. The function is so highly specialized that the person is hired based on his or her ability to perform it. (Example: The bassoonist in a symphony orchestra must be able to play the bassoon.)

Whether a particular function is essential is a factual determination made on a case-by-case basis, and all relevant evidence should be considered. The ADA provides that written job descriptions prepared before advertising or interviewing applicants for the job will provide evidence of whether a function is essential. 42 U.S.C. Section 12111(8) (Supp. 1992). Other factors to be considered include work experience of past employees or current employees in similar jobs, the amount of time on the job spent in performing the function, the terms of a collective bargaining agreement, and the consequences of not requiring the individual to perform the function.

2. Reasonable Accommodation

Under Section 1630.2(o) of the EEOC, reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without

disabilities.

56 Fed. Reg. 35735, 35736 (1991).

Examples of reasonable accommodation include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment and provision of qualified readers or interpreters. 42 U.S.C. Section 12111(9)(B) (Supp. 1992). The Interpretive Guidance includes other examples which might be reasonable accommodation such as providing reserved parking spaces and permitting the individual to provide his or own aids which the employer is not required to provide (such as a guide dog).

An employer is not required to reallocate essential functions. Thus, for example, an employer would not be required to hire as security guard a legally blind person who needed an assistant to look at identification cards when checking identification cards is an essential function of the job. On the other hand, it may be a reasonable accommodation for an employer to provide an interpreter for a hearing impaired attorney who must appear in court as an essential function of the job.

Reassignment to a vacant position may be a reasonable accommodation but the employer is not required to "bump" a current employee out of a position. An employer also may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to stay in the current position and there are no vacant equivalent positions for which the person is qualified. Generally, reassignment is considered only when accommodation within the current position would pose an undue hardship to the covered entity.

3. Undue Hardship

An employer entity is not required to provide an accommodation that will impose an undue hardship on the employer. Under Section 1630.2(p) of the EEOC, 56 Fed. Reg. 35736 (1991), undue hardship is the provision of an accommodation that would require significant difficulty or expenses in light of the following factors:

(i) The nature and net cost of the accommodation.

(ii) The overall financial resources of the employer.

(iii) The overall size of the employer's business with respect to number of employees, and number, type and location of facilities.

(iv) The type of operation of the employer.

(v) The impact of the accommodation on

the operation of the facility and
on the ability of other employees
to perform their duties.

The employer bears the burden of showing that an accommodation would impose an undue hardship.

E. Defenses

An employer with a claim of discrimination under the ADA has several potential defenses to such a claim.

1. Legitimate Nondiscriminatory Reason

This is the traditional defense to discrimination charges under Title VII of the Civil Rights Act and may be available in cases charging discrimination under the ADA. The crux of the defense is that the individual was treated differently not because of the individual's disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the disability.

2. Job Related and Consistent With Business Necessity

An employer may use selection criteria that screen out or tend to screen out individuals with disabilities when the criteria are job-related and consistent with business necessity and performance can not be accomplished with reasonable accommodation. For example, a requirement that an employee have a driver's license screens out an individual who has vision impairments. But if the requirement is job-related and consistent with business necessity, such a criterion would be permissible.

3. Direct Threat

Another defense is that the disabled individual would pose a "direct threat." Under Section 1630.2(r) of the EEOC, 56 Fed. Reg. 35736 (1991), "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Determination of whether an individual poses a significant risk of substantial harm must be made on a case-by-case basis. Factors which should be considered are:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

The consideration must rely on objective, factual evidence about the nature or effect of the disability, not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes.

4. Undue Hardship

Undue hardship, discussed above, is a defense to a charge that the employer failed to provide reasonable accommodation.

5. Conflict With Other Federal Laws

It may also be a defense to a charge of failure to make reasonable accommodation that the requested or necessary accommodation is prohibited by law. There are, for example, federal laws and regulations that address medical standards and safety requirements.

6. Regulation of Alcohol and Drugs

An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees, may require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace, and may hold an employee who uses illegal drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the employer holds other employees.

In addition, it is not a violation of the ADA for the employer to adopt or administer reasonable policies or procedures relating to illegal use of drugs, including drug testing, to ensure that an employee has completed or is participating in a rehabilitation program is no longer using the drug. For purposes of the ADA, a drug test is not considered to be a medical examination.

QUESTIONS AND ANSWERS

With the foregoing in mind, we have responded to your specific questions.

Question No. 1. Does Title I require compliance in any way by the City Employees' Retirement System and pension funds in general?

Response: Yes. As discussed earlier in this Memorandum of Law, the ADA has specifically adopted Title VII's broad definition of person. 42 U.S.C. Section 2000e(a) (1989). State governments, cities, towns, and municipalities all are subject to the ADA's requirements as long as these entities have more than 15 employees. This coverage is consistent with court interpretations of Title VII. Ogletree, Deakins, Nash, Smoak and Stewart, Americans with Disabilities Act: Employee Rights and Employer Obligations, Section 2.04 ┌1σ ┌2σ (1992).

The threshold question concerning whether CERS must comply with the ADA asks whether CERS is a "covered entity," i.e., whether CERS is an employer or an agent of an unquestioned covered entity, The City of San Diego ("City"). Title VII precedent is dispositive of this issue. As mentioned earlier,

the ADA specifically adopts Title VII's definition of "person." According to the Interpretive Guidance:

> The definitions section of part 1630 includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are "Commission," "Person," "State," and "Employer." These terms are to be given the same meaning under the ADA that they are given under title VII.

56 Fed. Reg. 35740 (1991) (emphasis added).

Title VII's definition of "person" is very broad, covering both governmental and private entities. It provides:

> The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, joint stock companies, trusts, unincorporated organizations, trusts, trustees in cases under Title XI, United States Code, or receivers.

In the landmark case of Los Angeles Dept. of W. & P. v. Manhart, 435 U.S. 702, 55 L. Ed 2d 657 (1978), the United States Supreme Court held that a pension fund contribution differential between males and females violated Title VII. In addition to the Department itself, the defendants included members of the Board of Commissioners of the Department and members of the plan's Board of Administration. Importantly, the City of Los Angeles conceded that it and the pension fund were "employers" under Title VII. As such, this decision is strong precedent for bringing CERS within the purview of the ADA.

Additionally, federal courts in other circuits have repeatedly stated that finding employer status should not be narrowly construed when interpreting Title VII. "Consistent with the Court of Appeals' implicit endorsement of liberal statutory construction of Title VII, the definition of 'employer' is to be construed to effectuate the 'remedial purpose of eradicating discrimination in employment.'" EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1261 (6th Cir. 1981).

"The Title VII term 'employer' has been construed in a functional sense to encompass persons who are not employers in

conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment." Id. at 1261. CERS clearly fits within this broad definition because it administers a pension plan for public employees.

Finally, under both Title VII and the ADA, an employer may be liable not only for its own discrimination, but also for the discrimination of third parties. The Act specifies that an employer commits "discrimination" if the employer participates in a contractual or other relationship that has the effect of discriminating against a qualified applicant or employee with a disability. Ogletree, Deakins, Nash, Smoak & Stewart, Americans with Disabilities Act: Employee Rights & Employer Obligations, Section 5.06 (1992).

According to the Interpretive Guidance: "An employer or other covered entity may not do through a contractual or other relationship what is prohibited from doing directly. This provision does not affect the determination of whether or not one is a 'covered entity' or 'employer' as defined in Section 1630.2." EEOC, 56 Fed. Reg. 35746 (1991) (emphasis added).

As further support, the Interpretive Guidance also provides in pertinent part:

> It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:
>
> . . . .
>
> (f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;
>
> . . . .
>
> (i) Any other term, condition, or privilege of employment.

56 Fed. Reg. 35736, 35737 (1991).

To establish employer responsibility for the discriminatory programs of third parties, the employer must be more than a broker, or other intermediary, that simply enables its employees to enter into arrangements with third parties; the employer must affirmatively, actively participate in the third-party program. Morgan v. Safeway Stores, Inc., 884 F.2d at 1211 (9th Cir. 1989).

Courts basing employer liability on participation in the third-party program have emphasized the fact that the employer

had some control over the terms of the program, and thus can be said to have perpetrated the discrimination. Id. at 1214. Here, it could be argued that there is a sufficient relationship to confirm CERS' status as an agent of the City. The City affirmatively and actively participates in the retirement system based upon its initial establishment of the program, its funding of the system and its involvement in Board membership by the City Manager, City Auditor and Comptroller, and appointees. As such, CERS might also be considered an agent of the City and hence an employer for ADA purposes.

In closing, it is our opinion that CERS would be deemed an employer for purposes of ADA coverage. Although we feel that the Title VII analogy is dispositive of the argument for bringing CERS under the ADA, we note that the potential presence of an agency relationship lends further support for this proposition. Recognizing also the sweeping mandate of the stated purposes of the ADA "(1) to provide a clear and comprehensive national mandate for the eliminating of discrimination against individuals with disabilities; ┌andσ (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," we conclude that CERS is a covered entity within the meaning of the ADA.

As a covered entity, CERS will be prohibited from discriminating against a qualified individual with a disability in the terms and conditions of employment, i.e., the employee's pension benefits.

Question No. 2. Will Title I require a change in the threshold definition of a disability retirement? If so, what revision?

Response: No. SDMC section 24.0501 sets forth the general standard for disability for members who joined the Retirement System before September 3, 1982. It provides in pertinent part:

> Any member, including a safety member, permanently incapacitated from the performance of duty as the result of injury or disease arising out of or in the course of his or her employment, shall be retired for disability with retirement allowance, regardless of age or amount of service. Any member, including a safety member, permanently incapacitated from any other cause shall be retired regardless of age but with a

retirement allowance only after ten years of creditable service.

SDMC section 24.1120 sets forth general standard for disability retirements for members who joined the Retirement System on or after September 3, 1982. It provides in pertinent part:

> (a) Any Member, as defined in section 24.0103(e), permanently incapacitated from the performance of duty as the result of physical injury or disease arising out of or in the course of his or her employment; and
>
> (1) not arising from a preexisting medical condition, or
>
> (2) not arising from a nervous or mental disorder, irrespective of claimed causative factors, shall be retired for disability with retirement allowance, regardless of age or amount of service.
>
> (b) The Board of Administration shall prescribe rules and regulations setting forth procedures for the retirement of a Member for disability.

With respect to health insurance, life insurance and other benefit plans, the EEOC Final Regulations provide:

> (f) Health insurance, life insurance, and other benefit plans -
> (1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.
>
> (2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent

with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f)(1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

EEOC, 56 Fed. Reg. 35739 (1991).

After reviewing the Rules and Regulations for Title I of the ADA, we cannot find any authority to require a change in the threshold definition of disability under either SDMC sections 24.0501 or 24.1120. The CERS standards for disability are reasonable, rationally based and nondiscriminatory in both substance and effect. Importantly, the current threshold definition of disability is applied to all members of the system in a like manner irrespective of their general, physical or mental health conditions.

In this regard, the Interpretive Guidance provides that: "[l]eave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability." EEOC, 56 Fed. Reg. 35746 (1991).

Question No. 3. Will Title I require revision of the standards for a disability retirement? If so, how should the standards be revised?

Response: No. Currently, the standards for disability retirements are set forth in the SDMC sections cited in our response to Question No. 2 and in the Board's rules and regulations covering disability retirement applications. With respect to the Rules and Regulations promulgated by the Board for disability retirements, Board Rule 17 provides:

Service-connected disability retirement will be approved only after a determination by the Board that the member is permanently incapacitated from the performance of duty, and that the incapacity is the result of injury or disease arising out of, or in the course of, a member's employment.

The Board shall consider all evidence presented and may continue the hearing from time to time in order to obtain additional information. The Board's determination shall be based upon all such evidence introduced at the hearing.

Where an applicant is permanently incapacitated by reason of industrial caused disability from substantially performing the duties and responsibilities of his position, as those duties and responsibilities are defined in his job classification, the applicant is entitled, on application, to industrial disability retirement, unless it can be shown:

1. There exists within the City service a properly classified permanent position or positions within the applicant's current classification, the performance requirements of which are less demanding in some respects than those set forth in the general job classification; and
2. The duties and responsibilities of the position are normally and usually performed by an employee in the applicant's job classification and salary range; and
3. That the applicant is able to carry out the duties and responsibilities of such position or positions despite his or her disability; and
4. That such position or positions have been tendered to the applicant in writing by the appropriate appointing authority at least five days prior to the application being heard by the Board Adjudicator.

> A determination by the Board that the incapacity is the result of injury or disease arising out of, or in the course of, employment, shall be made only after the Board has been presented with evidence that the injury or disease was service-connected or industrial.

CERS, Rules of the Retirement Board of Administration 20 (1982).

Again, the standards set forth in Board Rule 17 are reasonable, rationally based and nondiscriminatory. Applicants meeting the criteria for disability retirements will be awarded the same unless there exists and the applicant has been offered a comparable position within his or her current classification. The duties and responsibilities of the position, however, must be normally and usually performed by an employee in applicant's job classification. Importantly, the applicant must be able to carry out the duties and responsibilities of the tendered position despite his or her disability.

In essence, the standards described in this Board Rule embody the spirit of the "reasonable accommodation" requirements of the ADA at least to the extent that CERS has the authority and ability to impose "reasonable accommodation" criteria on either the City or the Unified Port District ("UPD"). In this regard, the mandate for "reasonable accommodation" rests squarely with the unquestioned "employer" i.e., the City or the UPD. Thus, while CERS is considered an "employer" under the ADA for employment discrimination purposes, its role in this context is very limited. The City or UPD have the responsibility to provide "reasonable accommodation" upon request.

Question No. 4: Is it recommended that language concerning "reasonable accommodation" be added to the Municipal Code? If so, please indicate what section of the Code should be revised and the recommended language.

Response: No. As set forth more fully in our response to Question No. 3, the mandate for reasonable accommodation rests squarely with either the City or the UPD. Only they have the authority to compel compliance in this regard.

Question No. 5 Should Section 24.1120 of the Municipal Code excluding pre-existing conditions for eligibility for disability retirement remain unchanged in the Municipal Code? If not, what revisions are required?

Response: The ADA does not mandate any changes to the preexisting condition exclusion provision currently set forth in

SDMC section 24.1120. The ADA is designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities. Importantly, the ADA seeks to ensure access to equal employment opportunities based on merit.

In this regard, the ADA requires:

> ┌That employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employers may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of this part.

EEOC, 56 Fed. Reg. 35746 (1991) (emphasis added).

In light of the foregoing, the preexisting condition set forth in SDMC section 24.1120 does not violate either the letter or the intent of the ADA. With respect to the ADA, no changes are recommended at this time.

Question No. 6: Is it recommended to comply to ┌sic Title I that more detailed pre-employment medical information be obtained from the Personnel Department on employees applying for disability retirement?

Response: Any recommendation in this regard is a matter of policy resting within the sound discretion of the Board. We do note, however, that compliance with Title I of the ADA does not require the gathering of more detailed employment medical information from the Personnel Department on employees applying for disability retirements. However, as a practical matter, the utilization of the pre-existing condition exclusion necessitates consideration of a disability retirement applicant's preemployment medical history.

Although preemployment examinations and inquiries are expressly prohibited by the ADA,

> ┌an employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition

> the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

EEOC, 56 Fed. Reg. 35751 (1991).

Information obtained in these examinations "regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record," subject to limited exceptions. EEOC, 56 Fed. Reg. 35738 (1991).

According to the Interpretive Guidance: "Consistent with this section and with Section 1630.16(f), ┌Health insurance, life insurance, and other benefit plansσ of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in Section 1630.16(f)." EEOC, 56 Fed. Reg. 35751 (1991).

As such, information contained in post offer examinations or inquiries could be utilized by CERS for the purpose of utilizing its preexisting condition exclusion.

The Board, however, has expressed interest in conducting its own post employment examinations in an effort to utilize the preexisting condition more efficiently. Although this decision is likewise a policy matter resting within the Board's sound discretion, we note that such examinations do not appear to be prohibited by the ADA. The ADA clearly provides that: "┌aσ covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity." EEOC, Fed. Reg. 35738 (1991).

Obviously, the financial implications and administrative concerns in either situation have not been addressed. Before any decision is made in this area, we recommend that these areas be thoroughly researched.

Question No. 7: Is it recommended that the Retirement Board of Administration implement its own Pre-Retirement Membership Medical Program?

Response: We do not have a recommendation at this time. As set forth more fully in our response to Question No. 6, this is a policy matter to be handled accordingly.

Question No. 8: Is it recommended that the Retirement Board of Administration implement its own alternative Rehabilitation Program?

Response: Again, this is a policy matter to be handled accordingly. Regardless, we don't have sufficient information to respond any further.

Question No. 9: Does Title I of ADA impact any other areas of the Municipal Code, or Retirement Board Rules and Policies and Procedures? If so, which Code sections and/or Board Rules and what changes are recommended?

Response: This Memorandum of Law has only addressed those SDMC provisions and Board Rules dealing with the CERS plan potentially impacted by the ADA. In addition to the SDMC, Board Rule, and Policies and Procedures already discussed, we are currently reviewing SDMC section 24.0510 ╒Periodic Physical Examinations of Disability Retireesσ and related its Board Rule ╒Rule 19-Aσ. We will provide more information on this topic and any new developments with the ADA at a future date.

In closing, it is conceivable that other SDMC sections outside of the retirement arena are also impacted by the ADA. However, without more specificity, we are unable to respond with anymore clarity at this time.

I hope this Memorandum of Law has addressed your concerns. Please contact me if you need further clarification.

JOHN W. WITT, City Attorney
By
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